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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 153

ELEANOR TAFT TILTON, MILDRED H. CLARK, CAROL D. GOLDSTONE, THEODORE GURNEY, HARVEY L. RAISNER, ELISABETH R. SWAIN, WYMAN W. PARKER, PAUL A. REYNOLDS, RUFUS BLANSHARD, JAY S. ROTH, CARL W. SCHAEFER, NORMAN T. DAVID, HERBERT T. GOLDSTONE, JAMES W. GARDNER, JR., CHARLES L. PENDLETON,

Appellants,

—v.—

ELLIOT L. RICHARDSON, Secretary of the United States Department of Health, Education and Welfare, JAMES E. ALLEN, JR., Commissioner of Education of the United States, MARVIN K. PETERSON, Chairman of the Commission on Aid to Higher Education of the State of Connecticut, SACRED HEART UNIVERSITY, ANNHURST COLLEGE, FAIRFIELD UNIVERSITY, ALBERTUS MAGNUS COLLEGE,

Appellees.

ON APPEAL FROM A THREE-JUDGE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR APPELLANTS

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In the

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No. 153

Eleanor Taft Tilton, Mildred H. Clark, Carol D. Goldstone, Theodore Gurney, Harvey L. Raisner, Elisabeth R. Swain, Wyman W. Parker, Paul A. Reynolds, Rufus Blanshard, Jay S. Roth, Carl W. Schaefer, Norman T. David, Herbert T. Goldstone, James W. Gardner, Jr., Charles L. Pendleton,

Appellants,

—v.—

Elliot L. Richardson, Secretary of the United States Department of Health, Education and Welfare, James E. Allen, Jr., Commissioner of Education of the United States, Marvin K. Peterson, Chairman of the Commission on Aid to Higher Education of the State of Connecticut, Sacred Heart University, Annhurst College, Fairfield University, Albertus Magnus College,

Appellees.

ON APPEAL FROM A THREE-JUDGE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR APPELLANTS

Opinion Below

The opinion of the United States District Court for Connecticut is not reported. It is set forth in the Appendix (separately printed) at A. 37.

Jurisdiction

The decision of the District Court and the judgment thereon were rendered and filed on March 19, 1970 (A. 68). A notice of appeal therefrom was filed on April 8, 1970. On June 22, 1970 this Court noted probable jurisdiction.

The jurisdiction of this Court rests on Title 28 of the United States Code, Section 1253. *Flast* v. *Cohen*, 392 U.S. 83 (1968).

The Constitutional and Statutory Provisions Involved

The First Amendment to the United States Constitution provides in part:

> "I. Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; * * *"

The relevant provisions of the Higher Education Facilities Act of 1963 20 U.S.C. §§ 701-58 (1964) are set forth as an appendix herein (*infra*, pp. 53-71).

The Questions Presented

Two questions are presented by this appeal:

(1) Does Title I of the Higher Education Facilities Act of 1963 authorize the expenditure of Federal funds to finance the construction of facilities at educational institutions controlled by religious groups and organized for and engaged in the propagation and promotion of the doctrine, teachings and practices of particular religions so long as the particular facilities so financed will not be used for sectarian instruction or as a place for religious worship or primarily in connection with any part of the program of a school or department of divinity?

(2) If the Act does authorize such expenditure is it to that extent violative of the provisions of the First Amendment to the Federal Constitution forbidding laws respecting an establishment of religion and prohibiting the free exercise thereof?

Statement of the Case

This action was brought by a group of individuals, citizens and taxpayers of the United States and residents of the State of Connecticut challenging the validity of certain expenditures, made by the Department of Health, Education and Welfare, for the construction of facilities at four church-controlled colleges in Connecticut. The complaint alleged that these institutions, joined as defendants to the action, were controlled and conducted by religious orders and the Roman Catholic Diocese of Bridgeport, and that they were organized for and, at the time when the specific

grants to them were authorized by the Commissioner of Education, were engaged in the propagation and promotion of the doctrine, teachings and practices of the Roman Catholic religion. The complaint further alleged that such expenditures were not authorized by Title I of the Higher Education Facilities Act of 1963 or, in the alternative, if they were authorized, that the Act was to that extent unconstitutional.

At the trial, considerable evidence was offered to support the factual allegations. Conversely, the institutional defendants offered considerable evidence in contradiction thereto. In addition, they offered uncontradicted (and to some extent uncontradictable) evidence that the specific facilities for which the expenditures were authorized had not and would not in the future be used for sectarian instruction or religious worship.

The District Court did not decide the contested factual issues. It held, first, that Congress had indeed intended to authorize expenditures for the construction of facilities at church-controlled educational institutions no matter what the purpose of their organization and the nature of their operations so long as the specific Federally financed facilities were not used for sectarian instruction or worship. It held, second, that the statute so construed was constitutional.

Summary of Argument

To construe the Higher Education Facilities Act of 1963 as the court below did, that is to encompass all institutions of higher education other than schools of divinity, irrespective of the extent of the role that religion plays in their purpose or operations, raises grave constitutional issues

under the First Amendment. A statute should be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts on that score. It is more than fairly possible to construe the statute challenged herein not to encompass institutions controlled by religious groups and in whose purpose and operations the propagation or practice of religion plays a major part. The court below was therefore in error in its construction of the statute.

If, however, the court below correctly construed the statute, it is to that extent unconstitutional as violative of both the Establishment and Free Exercise Clauses of the First Amendment.

Various tests have been suggested for measuring constitutionality under the Establishment Clause. The major ones are: (1) the *Everson* test which forbids financial support or subsidization of institutions which teach or practice religion; (2) the *Schempp* test which forbids governmental action whose purpose or primary effect is to advance religion; and (3) the *Walz* test which forbids governmental action that involves excessive entanglement in religion. Other tests consider whether religious institutions are unnecessarily utilized to advance secular purposes or emphasize the historic background of the challenged action and accord great weight to the long duration and universality of the challenged practice. Whichever of these tests is used, the result is the same: the Act as construed by the court below violates the Establishment Clause. The fact that the facility financed with Federal funds may not be used for sectarian instruction or religious worship does not mitigate the unconstitutionality of the statute under any of the tests; indeed, under the *Walz* test it aggravates it.

The statute, as construed by the court below, also violates the Free Exercise Clause since it constitutes a tax for religious purposes, and it is immaterial that the taxes paid by the plaintiffs or other taxpayers are not specifically earmarked for the effectuation of the statutory purposes, or that the amount of their taxes so used is minutely small.

ARGUMENT

I.

The Posture of the Controversy.

A. *The Complaint*

The complaint in this suit challenges the action of the Department of Health, Education and Welfare in allocating the funds of the United States to finance, in whole or in part, construction of facilities in sectarian schools and seeks both injunctive and declaratory relief. (Complaint, Paragraph 1. A. 7). It asserts that the Government, acting through the defendants Secretary of Health, Education and Welfare and the Commissioner of Education, justifies its action on the basis of the Higher Education Facilities Act of 1963 which authorizes grants of Federal funds for the construction of undergraduate academic facilities. It specifies four educational institutions in Connecticut, joined as defendants in this suit, as sectarian institutions to which such grants have been made or approved. (Paragraphs 20, 21, 22, 23, 24. A. 11-12). The complaint further alleges that it was not the intention of Congress in enacting the Higher Education Facilities Act of 1963 to require or authorize grants to institutions forbidden by the First Amendment to receive such grants, that is, sectarian educational

institutions, and if this was in fact the intent of Congress, the statute is to that extent unconstitutional. (Paragraphs 25, 28. A. 12-13). The educational institutions are joined as defendants on the ground that at the time the respective grants to them were authorized they were sectarian schools and hence constitutionally ineligible to receive the grants. The complaint requests a judgment declaring the Department of Health, Education and Welfare is not authorized to approve grants for construction purposes to sectarian colleges and enjoining it from approving such grants.

B. *The Relief Sought*

It is of fundamental importance to stress at the outset that the relief sought in this suit is not primarily or even substantially against the Defendant Colleges but against the Federal Government. Indeed, it was not necessary to join the colleges as Defendants. *Flast* v. *Cohen*, 392 U.S. 83 (1968) is a suit challenging use of Federal funds under the Elementary and Secondary Education Act of 1965 to finance instruction in sectarian schools below the college level. In that case, the only Defendants named are the Secretary of Health, Education and Welfare and the United States Commissioner of Education. The complaint herein could likewise have named only these two Federal officials as defendants. The colleges (and, therefore, the State of Connecticut) were joined as defendants to impart specificity and focus to the issues in the lawsuit (392 U.S. at 88) and to provide a tangible, factual background for the controversy[1] and, as in *Horace Mann League* v. *Board of Public Works*, 242 Md. 645, 220 A.2d 51 (1966), *cert. denied*,

[1] Cf. *W. E. DuBois Clubs* v. *Clark*, 389 U.S. 309, 312 (1968) wherein the Court expressed reluctance to decide "important and difficult constitutional issues * * * devoid of factual context."

appeal dismissed, 385 U.S. 97 (1966), to aid the Court in setting down standards and guidelines to distinguish institutions constitutionally eligible to receive Federal funds from those that are ineligible.

This suit was brought in Connecticut because it had to be brought somewhere. It could as well have been brought in practically any state in the Union for the Government took the position that no educational institution (other than theological seminaries) no matter how sectarian it may be is either statutorily or constitutionally disqualified from receiving Federal funds. Accordingly it has approved, and unless enjoined will continue to approve grants to sectarian institutions all over the nation. Hence, the plaintiffs seek a national declaration of judgment and a nationwide injunction.

We recognized, of course, that such a judgment and injunction, if sustained by this Court, would not be self-executing, except as to the four colleges joined in this suit (assuming they were all held ineligible). The Commissioner of Education, upon receipt of an application for a grant from a church-related institution, would be required in each case to determine according to the judicially fixed standards whether it is an ineligible sectarian institution, and the determination would be subject to judicial review in accordance with well-established procedures. This, however, is the normal if not the only practical procedure; certainly it is preferable to an administrative and judicial determination of each case unaided by over-all judicially established standards and guidelines.

C. *The Meaning of Sectarian*

It is also important to note that although we have used the term "sectarian" in our complaint and in the proceedings below as well as in this brief, we do not consider it synonymous with church-related. We do not contend that any relationship between an institution and a church disqualifies the former from receiving governmental funds. In the *Horace Mann League* case, four colleges, all church-related, were involved. Nevertheless, the Maryland court held that one of them, Hood College, was constitutionally eligible to receive state funds. Church relationship, the court held, is one factor, but only one to be considered and weighed in determining constitutional eligibility. Church relationship, moreover, is not fungible. In some cases it may be so close as to amount to complete church control; in others, it may be no more than a sentimental vestige of a relationship which has long ceased to have practical significance.

If church relationship is not of itself determinative, what is? In *Everson* v. *Board of Education,* 330 U.S. 1 (1947), the Court stated that government funds may not be used to support any institution that teaches or practices religion. Taken literally, this could mean that a college which employs a chaplain is disqualified, for under the law of agency his practice of religion is that of his principal, the college.

We make no such claim. We assert rather that under the Establishment Clause an institution is barred from receiving governmental funds if the propagation, teaching or practice of religion is a meaningful and major part of its existence.

It is to such an institution that we ascribe the term sectarian. We use that term as a word of art. When we characterized the Defendant Colleges as sectarian institutions, we meant thereby that at the time the respective grants of funds to them were approved by the Government, the propagation, teaching and practice of religion was in each case a meaningful and major part of their existence.

D. *The Disposition by the Court Below*

As we have indicated, the institutional defendants were joined in this suit and a trial was held to provide a tangible, factual background upon which standards and guidelines could be based to distinguish eligible from ineligible institutions. Such standards and guidelines were formulated by the Maryland Court of Appeals in the *Horace Mann League* case and its formulation has been followed by at least one state supreme court.[2]

The court below, however, adopted the position of the Government and ruled that what the institution exists for, what it does generally and how it does it are all irrelevant so long as it does not use the specific facility to which it earmarks governmental funds for sectarian instruction or religious worship. In other words, an institution which admits only students of a particular religion, requires them

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[2] *State ex rel. Warren* v. *Reuter*, 170 N.W. 2d 790 (1969) wherein the Supreme Court of Wisconsin said (at p. 801):

> Thus when we consider stated purposes and practices, the make-up of its governing board, faculty and student body, the content of its teachings, and its relationship with a religious organization, as relevant factors, Marquette School of Medicine is nonsectarian. These factors, while not exclusive, have legal significance in determining the nature of an institution. See *Horace Mann League of United States of America, Inc.* v. *Board of Public Works*, 242 Md. 645, 22 Atl. 2d 51.

to participate in religious activities, compels them to comply with the doctrines and dogmas of the religion, forces them to attend church, requires them under penalty of dismissal to take instruction in the theology and doctrines of the religion, and does everything to propagate and advance a particular religion other than confer degrees in divinity, can constitutionally receive governmental funds so long as in its bookkeeping it allocates these funds to the construction of a chemistry laboratory or biology classroom.

We do not contend that any of the four institutional defendants herein fit the above composite description of a sectarian educational institution. On the other hand, we do not concede that anything less than this composite would not also be deemed sectarian. The point is that the court's disposition practically removes the institutional defendants from the case, makes the entire trial record superfluous and meaningless, and brings the controversy to this Court in practical effect as a motion to dismiss for facial insufficiency. The issue before this Court therefore becomes one not of fact but of law, and that issue is whether an institution which we have described, and we have no doubt there are many such throughout the nation, may constitutionally receive governmental funds. The Government holds that it may, and has so applied the statute not only in Connecticut but in every state. The judgment we seek therefore is one which would only tangentially affect the institutional defendants herein but would be directed only against the Secretary of Health, Education and Welfare and the Commissioner of Education.

II.

The Question of Interpretation.

We believe the court below was in error in construing the statute to authorize payment of Federal funds to sectarian educational institutions (as we have defined the term sectarian).

The threshold question in every case challenging Federal administrative action as violative of the Federal Constitution is whether the challenged action is in fact authorized by statutory authority. The initial question that therefore must be decided in this case is whether the Higher Education Facilities Act of 1963 does authorize grants such as those approved by the Secretary and Commissioner and which continue to be approved.

In arguing that it does not, we do not rely upon any specific language in the statute. Nor do we rely on any specific legislative history whether in committee reports or in statements by Senators or Representatives in discussing the measure on the floors of Congress. To the extent that we rely on manifested Congressional intent, it is upon a negative rather than affirmative manifestation, namely the fact that the Congress could have easily stated expressly in the measure that sectarian colleges were within the purview of the law; had it done so, there would have been no question of interpretation before this Court. It is impossible to believe that the omission was an oversight; no issue was more thoroughly considered and strenuously debated than the inclusion or exclusion of sectarian colleges. The omission was a deliberate one, no less deliberate than the decision not to express a specific exclusion of sectarian institu-

tions. It was a decision not to tie the hands of the Court in interpreting the act.

Our reliance on the issue of interpretation is upon the well-settled principle that "a statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." *United States* v. *Jin Fuey Moy,* 241 U.S. 394, 401 (1916). Few principles of law have been so faithfully adhered to by the Court as this one. Literally scores of cases have been decided by the Court wherein it reached a constitutional conclusion through a statutory interpretation which, as the Court has said, was "in the candid service of avoiding a serious constitutional doubt." *United States* v. *Rumely,* 345 U.S. 41, 47 (1953). To summarize, or even list all these cases would unduly extend the length of this brief, and hence we merely cite in the footnote a representative sample in all of which, as in the present case, a challenge of unconstitutionality under the First Amendment was made to the court.[3]

The court below, in concluding that Congress intended to make the benefits of the Act available to church-related colleges, relied upon a legislative history which included statements made in debate by the sponsors and floor managers of the legislation. Assuming the probative force of such statements, the issue before this Court is not whether church-related colleges may receive governmental funds

[3] *Schneider* v. *Smith,* 390 U.S. 17 (1968); *Yates* v. *United States,* 354 U.S. 298 (1957); *United States* v. *Seeger,* 380 U.S. 163 (1965); *Cole* v. *Young,* 351 U.S. 536 (1956); *Greene* v. *McElroy,* 360 U.S. 474 (1959); *United States* v. *Rumely,* 345 U.S. 41 (1953); *Hannegan* v. *Esquire,* 327 U.S. 146 (1946); *Peters* v. *Hobby,* 349 U.S. 331 (1955); *Kent* v. *Dulles,* 357 U.S. 116 (1958); *Welsh* v. *United States,* 90 S. Ct. 1792 (1970).

but whether sectarian colleges, as we use the term, may do so. As we have indicated, we did not contend in the court below nor do we here that all church-related colleges and universities, no matter how tenuous the relationship, are excluded from the benefits of the Act. It is a far cry from an unwillingness of Congress to exclude all church-related institutions to a willingness to include them all, no matter how deep and extensive is their commitment to the propagation and practice of particular religions. Nothing in the legislative history of the Act necessarily supports a conclusion that Congress intended, irrespective of constitutional doubts, to include as beneficiaries institutions of the composite type that we have described above.

Certainly, the interpretation we suggest here is well within the limits of judicial construction to avoid constitutional doubts as expressed and applied in the cases we have cited.[4] Accordingly, we submit that this Court can and should resolve this case in terms of statutory construction rather than judicial review. Were the Court to do so, it would always be within the power of Congress, if dissatisfied with the decision, to amend the statute to express unambiguously the construction adopted by the court below. Should, however, the Court decide that the District Court's construction of the statute was correct and that the statute does in fact include as beneficiaries all educational institutions (other than divinity schools) irrespective of the nature and extent of their religious commitment, the Court must face the constitutional issue, and it is to this we now address ourselves.

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[4] Cf. concurring opinion of Mr. Justice Harlan in *Welsh* v. *United States*, 90 S. Ct. 1792, at 1798.

III.

The Establishment Clause.

A. *The* Everson *Test: Subsidization*

1. The Cases

It was not until the *Everson* case in 1947 that the Court found it necessary to examine closely into the meaning of the Establishment Clause as it applies to subsidization of religious institutions. The question did come to the Court in two earlier cases, *Bradfield* v. *Roberts,* 175 U.S. 291 (1899) and *Quick Bear* v. *Leupp,* 210 U.S. 50 (1908), but in neither did the Court examine into the history of the Clause or define its meaning. We will return to the former case (*infra* p. 24) but in respect to *Quick Bear* we note that the Court there held that treaty and other funds held for their Indian owners by the Federal Government as trustee could constitutionally be disbursed to pay the cost of tuition for the Indians at private, religious schools which they desired to attend. The Court upheld the expenditures because the funds belonged to the Indians and not to the government; the Indians had the right to use their own money to educate their children in the schools of their own choice, even if the government could not disburse its own money to the same schools because of the First Amendment prohibition of an establishment of religion.

In *Everson* the Court held unanimously that the First Amendment's ban on laws respecting an establishment of religion is applicable to the states by reason of the Fourteenth Amendment. Nevertheless, it ruled by a vote of five to four that a state (New Jersey) could constitutionally finance bus transportation of children to parochial as well

as public schools. The Court found the program to be a public safety measure to protect all children from traffic hazards and the dangers of the road. The Court said (330 U.S. at 17):

> We must consider the New Jersey statute in accordance with the . . . limitations imposed by the First Amendment. But we must not strike that state statute down if it is within the state's constitutional power *even though it approaches the verge of that power. . . . New Jersey cannot consistently with the "establishment of religion" clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church.* On the other hand, other language of the amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Nonbelievers, Presbyterians, or the members of any other faith, because of their faith or lack of it, from receiving the benefits of public welfare legislation. . . . " (Emphasis supplied.)

The Court set forth the following paragraph which was to become the most authoritative, frequently reiterated and almost classic exposition of the meaning of the Establishment Clause:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions,

> or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. *No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.* Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State." (330 U.S. at 16. Emphasis added.)

The *Everson* test has become known as the no-aid test, and as such has become subject to criticism in that the term "aid" is so broad that the decision in the case could be deemed (as Mr. Justice Jackson asserted in his dissenting opinion) inconsistent with the test formulated therein. But, we submit, the decision in *Everson* and the principle which it announced do not rest on a distinction between aid and no-aid, or even direct and indirect aid, but on a distinction between subsidization and non-subsidization. The *Everson* court upheld the New Jersey statute because and only because "the State contributes no money to the schools" and "does not support them" (330 U.S. at 18).

The principle that government may not subsidize an institution whose purpose and practice is to propagate religion was not created by the *Everson* court; it goes back to the earliest days of our history as a nation. Whatever may

be said of the "no-aid" test no decision of this Court since *Everson* has in any way impaired the principle of no-subsidization.

In *McCollum* v. *Board of Education*, 333 U.S. 203, 210 (1948), the Court held it unconstitutional to allow the use of public school premises for sectarian teachings. The Court repeated that, *"No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion."* (Emphasis supplied.)

In *Zorach* v. *Clauson*, 343 U.S. 306 (1952), the Court upheld the constitutionality of a program of released time for religious education under which children would be released from public school for one hour a week to receive religious instruction in church schools, *because no expenditure of public funds or use of public buildings was involved.* The Court said: *"Government may not finance religious groups* nor undertake religious instruction *nor blend secular and sectarian education . . ."* (343 U.S. at 314. Emphasis supplied.)

In *McGowan* v. *Maryland*, 366 U.S. 420, 443 (1961), and in *Torcaso* v. *Watkins*, 367 U.S. 488, 493 (1961), the Court again, in each case, repeated the statement, made in the *Everson* and *McCollum* cases, that *"No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion."* (Emphasis supplied.)

In *Engel* v. *Vitale*, 370 U.S. 421, 431 (1962), the Court, in holding unconstitutional the practice of prayer recitation

in the public schools, which had been prevalent almost since the founding of the public schools, stated that when "the power, prestige *and financial support* of government is placed behind a particular religious belief," the Establishment Clause of the First Amendment is violated. (Emphasis supplied.) The Court quoted from Madison's *Memorial and Remonstrance* that (at 436) ". . . the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever."

In *Abington School District* v. *Schempp,* 374 U.S. 203 (1963) the Court in invalidating devotional Bible reading in public schools, quoted from Mr. Justice Jackson's dissenting opinion in *Everson* that "There is no answer to the proposition • • • that the effect of the religious freedom Amendment to our Constitution was to take every form of propagation of religion out of the realm of things which could directly or indirectly be made public business and thereby supported in whole or in part at the taxpayers' expense" (374 U.S. at 216).

In *Board of Education* v. *Allen,* 392 U.S. 236 (1963) the Court held, as it had in *Everson,* that where a state undertakes a secular program for the benefit of children, the program is not constitutionally impermissible merely because as an incidental by-product thereof religious educational institutions might benefit. That is a far cry from saying that government may make a direct financial grant to such an institution. This the Court made clear in the following language:

> . . . The law merely makes available to all children the benefits of a general program to lend school books

> free of charge. Books are furnished at the request of the pupil and ownership remains, at least technically, in the State. *Thus no funds or books are furnished to parochial schools, and the financial benefit is to parents and children, not to schools.* Perhaps free books make it more likely that some children choose to attend a sectarian school, but that was true of the state-paid bus fares in *Everson* and does not alone demonstrate an unconstitutional degree of support for a religious institution. (392 U.S. 243-244. Emphasis added.)

As if to underline the critical distinction between aiding children and their parents on one hand and a direct financial grant to the religious institutions, the Court stated:

> It should be noted that the record contains no evidence that any of the private schools in appellants' districts previously provided textbooks for their students. There is some evidence that at least some of the schools did not; intervenor defendants [parents of children attending parochial schools] asserted that they had previously purchased all their children's textbooks. . . . (*Ibid.*).

Thus, *Allen,* unlike the present case, presents no instance of governmental financing relieving the sectarian school of an expenditure which it otherwise would have made.

Long before the statute upheld in *Allen* was enacted, New York, like all other states, established public libraries open to all children for the borrowing of books. Certainly children attending parochial schools visited these libraries and borrowed books which they used in connection with

their parochial school studies. It is by no means impossible that if there were no public libraries in the community the parochial school authorities might have found it necessary to purchase the books for use by the children. To that extent the parochial school is aided by the existence of the public libraries. Yet no one would contend that the state may not build public libraries and include books therein which are usable in connection with parochial school studies. As construed by the Court in *Allen*, the New York statute, at least in the absence of contrary evidence, effects the same result. But no reading of *Allen* can support the conclusion reached by the court below that this or any other decision allows governmental financing of the construction of a library as part of the parochial school.

On the same day that *Allen* was decided, the Court decided *Flast*, which, we believe, supports our conclusion. The gravamen of the complaint in that case was that Federal funds appropriated under the Elementary and Secondary Education Act of 1965 were being used to finance instruction in reading, arithmetic and other secular subjects in religious schools and to purchase textbooks and other instructional materials for use in such schools, all in violation of the Establishment Clause of the First Amendment. The Government moved to dismiss the suit on the ground that the plaintiffs, as mere taxpayers, had no standing to challenge judicially an expenditure of Federal funds.

While the Court specifically stated that it was not passing on the merits of the particular case since there was nothing before it but the complaint, it upheld the plaintiffs' standing to sue. It did so on the ground that the complaint did allege a facially sufficient claim under the First Amendment's Establishment Clause. Such a holding could

not have been made if governmental financing of the so-called secular aspects of sectarian schooling did not raise a constitutional issue under the First Amendment. Were such financing not inconsistent with the Establishment Clause, the plaintiffs' challenge would simply be to an expenditure for the general welfare, a challenge which the Court held could not, under *Frothingham* v. *Mellon,* 262 U.S. 447 (1923), be made by a taxpayer.

That the Court deemed subsidization of institutions that teach or propagate religion violative of the Establishment Clause is clear from the following (392 U.S. at 103-104):

> Our history vividly illustrates that one of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption was that the taxing and spending power would be used to favor one religion over another or to support religion in general. James Madison, who is generally recognized as the leading architect of the religion clauses of the First Amendment, observed in his famous Memorial and Remonstrance Against Religious Assessments that "the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever." 2 Writings of James Madison 183, 186 (Hunt ed. 1901). The concern of Madison and his supporters was quite clearly that religious liberty ultimately would be the victim if government could employ its taxing and spending powers to aid one religion over another or to aid religion in general. The Establishment Clause was designed as a specific bulwark against such potential abuses of governmental power, and that clause

of the First Amendment operates as a specific constitutional limitation upon the exercise by Congress of the taxing and spending power conferred by Art. I, § 8.

Nothing in *Walz* v. *Tax Commission of City of New York*, 90 S. Ct. 1409 (1970), the latest Establishment case, indicates an intent to repudiate or abandon the *Everson* principle barring the subsidization of institutions that teach or practice religion. True enough, the Court commented on the "hazards by placing too much weight on a few words or phrases" and illustrated this hazard by reference to the words in the paragraph in *Everson* quoted above which state that government may not "pass laws which aid one religion, aid all religions, or prefer one religion over another" (90 S. Ct. at 1412). But the Court in upholding the tax exemptability of religious institutions made it quite clear that it was not sanctioning governmental subsidization of such institutions. The whole tenor of the decision reflects a constitutional distinction between subsidy and exemption and an avoidance of anything that might be construed to impair the vitality of the basic *Everson* principle. Thus, the Court emphasized that

> The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to the churches but simply abstains from demanding that the church support the state. • • • (90 S. Ct. at 1415).

Again, the Court said (at 1414):

> Granting tax exemptions to churches necessarily operates to afford an *indirect* economic benefit and also gives rise to some, but yet a lesser, involvement

> than taxing them. *In analyzing either alternative the questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement. Obviously a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards, but that is not this case.* The hazards of churches supporting government are hardly less in their potential than the hazards of governments supporting churches; each relationship carries some involvement rather than the desired insulation and separation. We cannot ignore the instances in history when church support of government led to the kind of involvement we seek to avoid. (Emphasis added.)

The only decision of this Court which upheld the constitutionality of a direct grant of governmental funds to a religious institution is *Bradfield* v. *Roberts, supra.* In that case the Court upheld the payment of Federal funds to construct a hospital operated by a corporation formed by members of a religious order. This decision was not unknown to the Court that decided *Everson;* it is cited in both the majority opinion (330 U.S. at 15) and the dissenting opinion of Mr. Justice Rutledge (at 44). Nevertheless, the Court (and of course the minority) stated unambiguously that tax raised funds could not constitutionally be used to support institutions which teach or practice religion.

What then is the basis of the *Bradfield* decision? It is that Providence Hospital neither taught nor practiced religion; it taught nothing and practiced only medicine.

Therein lies the distinction between *Bradfield* v. *Roberts* and the present case. While religion may motivate the establishment and conduct of a hospital, as well as of a college, education is inherently more closely related to the propagation and teaching of religious tenets and viewpoints. A governmental subsidy to a religious educational institution is a use of tax money which directly supports an institution formed and operating for the purpose of providing a *religious education.* Religion is an integral part of what the institution teaches, rather than merely the motivation for a function far less directly related to the propagation of religious tenets, such as healing the sick. Such a distinction is the only basis upon which the Court's expressions can be reconciled and continuing vitality given to *Bradfield* v. *Roberts.* If the distinction were not valid, there would have been no point to the whole *Everson* opinion—if *Bradfield* v. *Roberts* applied to education, there would have been no need to go to such lengths to find the challenged statute public safety legislation. The Court could simply have cited *Bradfield* v. *Roberts* and observed that even if funds are granted for education, education is a welfare function no matter who performs it. Instead, the court made clear that the Constitution prohibits the contribution of "tax-raised funds to the support of *an institution* which *teaches* the tenets and faith of any church." (Emphasis supplied.) If subsidization of religious educational institutions is welfare legislation, it involves a kind of "welfare" so different from hospitals that the Court has given the difference constitutional significance.

This critical distinction becomes clearer when it is noted that the agreement between the City of Washington and

Providence Hospital provided that the latter would accept and care for indigent patients sent to it by the former. Can a state close its public colleges and send the students to educational institutions organized and operating to practice and propagate religion? Can it send them to educational institutions whose composite profile we have described above? The District of Columbia could constitutionally send its indigents to Providence Hospital for medical care and therefore could constitutionally support it. It could not constitutionally send its indigents to a sectarian college and therefore we submit could not constitutionally support it.

Finally, there is one further fundamental distinction between *Bradfield* and the present case. In *Bradfield* the Court stressed that there was no allegation that the institution's "hospital work is confined to members of * * * [the] church. * * * The charter itself does not limit the exercise of its corporate powers to the members of any particular religious denomination, but on the contrary those powers are to be exercised in favor of any one seeking the ministrations of that kind of institution" (175 U.S. at 298-299). The statute challenged herein, at least as construed and applied by the Government, does not bar from its benefits an institution whose policies and practices excludes all but members of the denomination which sponsors and controls it.

In *Everson* the Court said:

> * * * New Jersey cannot consistently with the "establishment of religion" clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church. On the other hand, other language of the

amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it,* from receiving the benefits of public welfare legislation. * * * (330 U.S. at 16. Emphasis in original.)

If the First Amendment forbids government from excluding persons because of their faith or lack of it from receiving the benefits of public welfare legislation, can it consistently with that Amendment achieve the same result by financing an institution which provides welfare on a religiously discriminatory basis? We submit the First Amendment cannot be so easily evaded.[5]

2. The Statute

If, as we contend, the Establishment Clause forbids governmental financing of sectarian educational institutions, the Higher Education Facilities Act of 1963 is not immune from constitutional challenge merely because it provides that the funds granted thereunder shall not be used to finance the construction of facilities used for sectarian instruction or religious worship.

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[5] While this appeal is based on the First Amendment and, as *Bradfield* and *Everson* indicate, that Amendment forbids governmental subsidization of church-controlled institutions which bar entrance to non-church members, we suggest that independently thereof the Fifth (and Fourteenth) Amendments at least implicitly impose the same prohibition on the government. See Note, *Public Control of Private Sectarian Institutions Receiving Public Funds,* 63 Mich. L. Rev. 142 (1964); cf. *Simkins* v. *Moses H. Cone Memorial Hospital,* 323 F.2d 959, *cert. denied,* 376 U.S. 938 (1966).

In the first place, the fact still remains that the financed facility is available only to students of the college and thus excludes from its benefits "individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or members of any other faith, because of their faith or lack of it."

In the second place, none of the decisions of this Court make any distinction or even imply a distinction between the financing of a sectarian educational institution and a part thereof. *Everson* forbids the contribution of "tax-raised funds to the support of an *institution* which teaches the tenets and faith of any church," and states that "No tax in any amount, large or small, can be levied to support any religious activities *or institutions,* whatever they may be called, or whatever form they may adopt to teach or practice religion." The same language is used in *McCollum, McGowan* and *Torcaso.* In *Zorach* the Court said that "Government may not finance religious groups • • •". In *Allen* the Court noted that "no funds or books are furnished to *parochial schools.*"

If the decision of the court below is correct then government may contribute tax-raised funds to a congregation of a church so long as they are earmarked for repair of the furnace room since that room is not "used • • • as a place of religious worship."

Suppose a congregant earmarked his contribution to a church exclusively for repair of the furnace room, could the Internal Revenue disallow the deduction on the ground that it was not for a "religious • • • purpose"? (Int. Rev. Code 170(c)(2)(B)).

Finally, it would make a mockery of the Establishment Clause if its provisions could be so easily evaded by bookkeeping entries. A classroom or chemistry laboratory in a college is not a separate institution; it is part of the college and that which subsidizes it subsidizes the college. The money received by the college from the government goes into the same treasury as other moneys; it is used for the same overriding purpose, that is, to maintain the college so that it may propagate religion. Cost accounting is subordinate to, not superior to the Constitution.

B. *The* Schempp *Test: Purpose and Effect*

In *Schempp*, the Court, in invalidating a Bible reading statute under the Establishment Clause, said:

> The test may be stated as follows: what are the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect which neither advances nor inhibits religion (374 U.S. at 222).

As we have indicated, there is nothing in *Schempp* or in any subsequent decision of this Court to support an assumption that the *Everson* principle that government may not finance institutions engaged in the practice or propagation of religion has been repudiated or abandoned. Certainly, nothing in the *Schempp* opinion suggests anything even remotely justifying such an assumption. Indeed, in *Schempp* the Court cited *Everson in support of the*

Schempp test. The justification for the assumption lies, if anywhere, not in *Schempp* but in *Allen*. Applying the test set forth in *Schempp*, the Court held that it could not assume that either the purpose or primary effect of a statute providing for the loan of secular textbooks to children attending nonpublic schools, including parochial schools, was to advance religion.

But *Allen* hardly supports an assumption that the *Everson* test was repudiated. In *Allen*, the Court not only cited *Everson* but quoted the critical phrase from the classic paragraph that the First Amendment bars any "tax in any amount, large or small • • • levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion" (392 U.S. at 242). Quoting a principle with approval, we suggest, is hardly an effective way of repudiating it.

If the court below was correct in its apparent assumption that the *Everson* test has been superseded by *Schempp*, then it would seem even more clear that the *Schempp* test has been superseded by *Walz*. After all, the *Schempp* Court expressly relied on *Everson* for its test whereas the *Walz* Court did not cite *Schempp* even in a footnote. On the contrary, the Court in *Walz* studiously avoided application of the *Schempp test*. While it noted that the "legislative purpose of a property tax exemption is neither the advancement nor the inhibition of religion" (90 S. Ct. at 1413), the second half of the test it applied was stated not in terms of advancement or inhibition (as in *Schempp*) but of "entanglement" (*id.* at 1414).

We do not urge that *Walz* has superseded *Schempp* for the same reason that we believe *Schempp* did not super-

sede *Everson*. All three tests express in differing phraseology a principle which has been part of American history from its beginning as a nation, the principle that tax-raised funds may not be used to support institutions that practice or propagate religion.

Assuming, however, that we are incorrect on both scores, and that *Schempp* promulgated a new and different test which was not superseded by *Walz*, we submit, nevertheless, that the court below was in error in holding that the statute challenged here can constitutionally be applied to institutions whose purpose and operation is the practice, teaching and propagation of religion.

1. Purpose

The court below, in finding that the challenged statute does not have as its purpose the advancement of religion, stated (A. 48-49):

> Applying the secular purpose and primary effect test to the Act here in question, we find that it clearly meets the first requirement of a secular legislative purpose. The purpose of the Act appears on its face. It contains a congressional declaration that the policy underlying the Act is to increase the student enrollment capacity of the Nation's institutions of higher education through grants for construction of academic facilities to help provide young people with the greatest possible opportunity for higher education; and such declaration is based on congressional findings that *there is an urgent need for construction of such facilities to enable these institutions to accommodate anticipated increase in student enrollments. • • • We hold, based on Congress' declaration of policy and findings,*

> *that the Act has the secular purpose of increasing the student enrollment capacity of the Nation's institutions of higher education*—an existing urgent public need—and that the Act does not have the purpose of promoting religion of any kind. (Emphasis added.)

We need not raise the difficult question as to what extent the Court may examine into the actual purpose of an act of Congress where that differs from the stated purpose and if stated would require a determination that the act violates the Constitution.[6] We accept the Congressional statement of purpose as it appears in the statute and as summarized by the court below. We do not, however, accept the court's conclusion that "the Act does not have the purpose of promoting religion of any kind."

The court below reached its conclusion by placing all colleges under a single umbrella of "institutions of higher education" and inferring that since most such institutions are secular the umbrella is secular and all under it are entitled to the aid which the umbrella gives.

In *Walz*, the Court speaking of the policy of "religion to maintain schools that plainly tend to assure future adherents to a particular faith by having control of their total education at any early age," stated that "No religious body that maintains schools would deny this as an affirmative if not dominant policy of church schools" (90 S. Ct. at 1412-1413). While the Court was speaking of elementary

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[6] *Cf. Barenblatt* v. *United States*, 360 U.S. 109, 153-162 (dissenting opinion of Mr. Justice Black), 166 (dissenting opinion of Mr. Justice Brennan) (1959) (First Amendment); *United States* v. *Kahriger*, 345 U.S. 22, 39-40 (dissenting opinion of Mr. Justice Frankfurter) (1953) (Fifth Amendment); *Bailey* v. *Drexel Furniture Company*, 259 U.S. 20 (1922) (Tenth Amendment). See also, Note, *Legislative Purpose and Federal Constitutional Adjudication*, 83 Harv. L. Rev. 1887 (1970).

and secondary schools, the statement is certainly true of many colleges as well. Indeed, it may be assumed that the propagation of religion to the young is the dominant purpose and policy of those churches which at great expense maintain sectarian colleges—else, why do they do so?[1] In any event, in view of the posture which this case has taken it must be assumed that the Government has in the past and unless enjoined will in the future continue to finance under the Act educational institutions whose primary or dominant purpose is the advancement of religion.

The stated purpose of the Act is to increase enrollment at educational institutions. Under Section 106 (20 U.S.C. 716) an institution of higher education is eligible for a grant only if the financed construction will "result in an urgently needed substantial expansion of the institution's student enrollment capacity." Insofar as an institution is a secular one, no constitutional problem arises. But if the dominant purpose of the institution is to advance religion through propagation we cannot see how a law whose pur-

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[1] In this respect maintenance of educational institutions is fundamentally different in purpose from maintenance of hospitals, homes for orphans and the aged, etc. Every religion (as well as secular ethics) commands the performance of "good works," and these are universal and secular. There is nothing particularistic about caring for the ill, the aged, the infirm, the poor and the orphaned. This command is found not only in the Scriptures of Jews, Christians and Moslems, but of all religions. But when Moses commanded Israel "thou shalt teach them diligently unto thy children" (Deut. 6:7) he was referring only to the Torah and not to secular subjects; and when Jesus commanded his disciples "Go ye therefor and teach all nations," he meant the Gospel, and not the wisdom of the Greeks. Indeed, there are some religions which forbid their adherents to teach or learn secular subjects at all or beyond the elementary grades. See, *People* v. *Donner*, 199 Misc. (N.Y.) 643, *aff'd*, 278 App. Div. 705, *aff'd*, 302 N.Y. 857, *appeal dismissed*, 342 U.S. 884 (1951); *State* v. *Garber*, 197 Kan. 567, *appeal dismissed*, 389 U.S. 51 (1967).

pose is to enable the institution to enroll more students (and thus propagate religion to more persons) can have any purpose other than to advance religion. We do not believe it is within the power of Congress or the Government or the court below to categorize all educational institutions (other than divinity schools) as secular merely because many or even most of them are, nor that a purpose to increase enrollment in all is secular because some of the institutions are secular.

Perhaps if there were no practicable way of separating the sectarian from the secular, an argument could be made that the overriding secular purpose of Congress will of necessity encompass the sectarian institutions. But there is no convincing proof, or even finding by Congress, that this is the case. Administration of state statutes subsidizing secular colleges under constitutional provisions forbidding subsidization of sectarian ones (e.g., Pennsylvania and New York) shows conclusively that it is feasible to do so administratively; *Horace Mann League* v. *Board of Public Works, supra,* and *State ex rel. Warren* v. *Reuter, supra,* show that it can be done judicially.[8]

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[8] A study of church-related higher education made for the Danforth Foundation and published by the American Council on Education, utilized six factors in measuring the religiousness of colleges and universities (church control of board, ownership by church, financial support by church, institutional acceptance of denominational standards, institutional statement of purpose reflecting denominational or religious orientation, and church membership as a factor in selecting faculty and administrative personnel). It listed the 817 institutions studied and rated each of them as to each of these factors. M. Pattillo and D. MacKenzie, *Church-Sponsored Higher Education in the United States,* pp. 230-247 (1966). As can be seen, the factors utilized in the study were to a large extent similar to those used by the Maryland Court of Appeals in *Horace Mann League* and the Wisconsin Supreme Court in *State ex rel. Warren* v. *Reuter.*

There is a critical difference (aside, of course, from subsidization of the institution) between *Everson* and *Allen* and the present case. In neither of those cases was it the purpose of the statute to increase or even maintain enrollment in the particular sectarian institutions. As the Court said in *Allen*, speaking of *Everson*,

> • • • The statute was held to be valid even though one of its results was that "children are helped to get to church schools" and "some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own pockets" (392 U.S. at 242).

Thus the increased or stable enrollment of the school was merely an incidental byproduct of a statute having an obviously secular purpose. In the present case, increased enrollment is *the* purpose of the statute.

That the Federal funds are earmarked for facilities which are not to be used for sectarian instruction or religious worship no more removes the constitutional barrier under the purpose-effect test than it does under the subsidization test. As we have seen, the purpose of the statute is to increase enrollment at the institution, not to provide those already enrolled with instruction in chemistry or biology. The additional facilities are a means not an end. They serve the same basic purpose for a college as the fur-

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Of the Roman Catholic institutions studied 45.4% were rated as having all six elements; of the non-Catholic the percentage was 35.4. *Id.* at 33. Of the institutional defendants in the present case only Albertus Magnus was found to have all six elements; Annhurst had three and Fairfield four. Sacred Heart, which started operations in 1963 after the study was completed, was not rated.

nace serves for a church—that is, not to heat the congregation but to get them into the church for the practice and propagation of religion. Even the most deeply religiously committed educational institutions recognize that unless they provide secular education alongside their sectarian instruction their efforts at propagating religion among young adults would be in large measure ineffectual. But they were organized and operated in pursuance of the church's religious endeavors; the teaching mission of the church refers to religious, not secular teaching.[9]

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[9] The use of secular instruction to further religious purposes is hardly new. What is probably the progenitor of the American public educational system was the Massachusetts law of 1647 which provided in part:

> It being one chief project of that old deluder, Satan to keep men from the knowledge of the Scriptures, as in former times by keeping them in an unknown tongue, so in these later times by persuading from the use of tongues, that so at least the true sense and meaning of the original might be clouded by false glosses of saint-seeming deceivers, that learning may not be buried in the graves of our fathers in the church and commonwealth, the Lord assisting our endeavors,—
>
> It is therefore ordered, that every township within this jurisdiction, after the Lord hath increased them to the number of fifty householders, shall then forthwith appoint one within their town to teach all such children as shall resort to him, to read and write, whose wages shall be paid, either by the parents or masters of such children, or by the inhabitants in general, by way of supply, as the major part of those who order the prudentials of the town shall appoint. * * * R. Finney, *A Brief History of the American Public School* 4 (1946).

Of course, long before *Schempp* this religious purpose for secular education had disappeared and the validity of public support for the school system is not vulnerable because of the religious origin of the system. *McGowan* v. *Maryland*, *supra*. We have no doubt that many nonpublic colleges and universities, such as Harvard, Yale, Princeton and Columbia, none of which are listed by Pattillo and Mackenzie, have gone through a similar change. As the Maryland court's decision upholding the grant to Hood College in *Horace Mann League* and *Warren* v. *Reuter*, upholding grants to Marquette Medical School indicate, the First Amendment does not

2. Effect

What we have said in respect to purpose applies equally in respect to effect. If the purpose of the statute to increase enrollment in educational institutions irrespective of the extent and intensity of their sectarian commitment is fulfilled, then the effect cannot be other than to advance religion.

The most recent judicial consideration of the constitutionality of a statute purporting to finance only the secular aspects of church school education herein is the case of *Dicenso* v. *Robinson*, decided by the United States District Court for Rhode Island on June 15, 1970 (notice of appeal filed June 25, 1970). The court unanimously held the statute unconstitutional, the majority (Circuit Judge Coffin and District Court Judge Bownes) on the ground that it violated both the *Schempp* and the *Walz* tests, the minority (District Court Judge Pettine) on the ground that it violated the *Walz* test. In his opinion Judge Coffin said:

> The second part of the *Schempp* test—determining the statute's "primary effect"—presents a more difficult problem of both definition and application. Plaintiffs have argued that "primary" means "essential" or "fundamental". Defendants and intervenors have taken a more literal position, claiming that "primary" means "first in order of importance". The problem of definition is critical in this case, because, as we have noted in our findings, the Act has two significant effects: on the one hand, it aids the quality

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bar governmental grants to such institutions. We emphasize again that our challenge is only to grants to institutions where the propagation of sectarian religion remains a dominant purpose and policy.

of secular education; on the other, it provides support to a religious enterprise. Judicial efforts to decide which of these effects is *"the* primary effect", as *Schempp* seems to require, are likely to be no more satisfactory than efforts to rank the legs of a table in order of importance.

Intervenors, in an effort to give shape to the *Schempp* test, have urged us to focus solely on the activity subsidized in judging effect. In other words, intervenors propose that we examine only the activities of the teachers receiving aid and ignore the religious nature of the schools in which they teach. Such a narrow perspective, however, strikes us as unrealistic when examining direct financial aid to denominational schools. The expenses of a religious institution may be apportioned in a variety of ways among its "secular" and "religious" activities. Under plaintiffs' [intervenors' (!)] proposed test, sophisticated bookkeeping could pave the way for almost total subsidy of a religious institution by assigning the bulk of the institution's expenses to "secular" activities. • • •

In a footnote Judge Coffin added:

Our brother in dissent accepts intervenors' narrow view of the *Allen* test. However, in *Allen* there was no record on which to predicate a finding that the effect of the statute would differ from its declared purpose. Moreover, as our findings indicate, the "religious enterprise" assisted in this case is not the discrete teaching of religion, but the maintenance of an educational environment within which religious instruction takes place in varied ways. *McCollum* v.

Board of Education, 333 U.S. 203 (1948), suggests to us that such an environment may not be maintained at public expense. • • •

We are aware, of course, that *Dicenso* dealt with elementary and secondary schools rather than colleges but we believe that what we have quoted applies as well to many church colleges. As Pattillo and Mackenzie state in their study of church related colleges (at p. 127): "It hardly need be said that the distinction between religion and other aspects of an institution's educational program is artificial. Religion, properly understood, is a pervasive element."

The statute challenged here does not require that the facility financed with Federal funds be situated off the campus, or even in a separate building, and the Department of Health, Education and Welfare construes it to allow financing of a laboratory or a library situated in a building otherwise devoted to sectarian instruction, so long as there is some visible partition between them. It is, we submit, unrealistic even at the college level to create an island of secularity surrounded by a sea of sectarianism.

The catalogue of Wheaton College, Illinois (quoted in Pattillo and Mackenzie at p. 19) reads:

> The central purpose of Wheaton College is expressed in the motto engraved on the cornerstone of the main building: For *Christ and His Kingdom.* Since the foundation of the institution, this purpose has produced an enthusiastic concern for truth, righteousness and beauty, and has thereby given meaning to the ideal of a Christian liberal arts college that seeks

> to understand human culture from a Biblical and theistic viewpoint, and to encourage responsible Christian participation in contemporary society.

Perhaps this does not mean what it says, or perhaps this particular institution does not deliver what it promises. But can it be said that there are no significant number of sectarian colleges in the United States who do in fact mean what they say and deliver what they promise? Can it be realistically held that a governmental grant of funds to erect a laboratory or classroom extension in such an institution does not have the effect of advancing religion? We do not think so.

C. *The* Walz *Test: Entanglement*

In the *Walz* case, the latest examination into the meaning of the Establishment Clause by this Court, it was held that if the purpose of a law is to advance or support religion it is unconstitutional. We have sought to establish that insofar as sectarian educational institutions are concerned, the purpose of the statute is in fact to advance and support religion.

But even if that is not its purpose, the law is still unconstitutional if its end result or effect is "an excessive government entanglement with religion" (90 S. Ct. at 1414). Tax exemption for churches was upheld because it involved less entanglement than would the removal of exemption. But exemption, the Court held, was constitutionally different from subsidy because the latter does involve entanglement. The Court said (at 1414):

> Granting tax exemptions to churches necessarily operates to afford an indirect economic benefit and also

gives rise to some, but yet a lesser, involvement than taxing them. In analyzing either alternative the questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement. Obviously a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards, but that is not this case. The hazards of churches supporting government are hardly less in their potential than the hazards of governments supporting churches; each relationship carries some involvement rather than the desired insulation and separation. We cannot ignore the instances in history when church support of government led to the kind of involvement we seek to avoid.

In none of the school cases considered by this Court was the challenged statute upheld where the record showed state involvement in church affairs or church involvement in state affairs. In *Everson* the children were brought to the parochial schools on public buses, but no public official entered the school. In *Zorach*, the state did no more than release the children before the regular dismissal time; it in no way sought to control or supervise the instruction within the church school. In *Allen* all the statute contemplated that the state should do was to provide children attending parochial schools with textbooks which had independently been selected by public authorities for use in public schools.[10] In *McCollum*, on the other hand, church

[10] Whether in practice this is what happened may be questionable. See Note, *Sectarian Books, the Supreme Court and the Establishment Clause*, 79 Yale L.J. 111 (1969).

teachers entered the public school premises and with the cooperation of the school authorities conducted their religious instruction.

The provision in the present statute forbidding use of the Federally financed facility for religious worship or sectarian instruction was placed there because otherwise it would be unconstitutional under the principles of *McCollum*, *Engel* and *Schempp*. But in seeking to avoid the Scylla of sectarianism the statutory plan is necessarily engulfed in the Charybdis of entanglement. There is simply no way of avoiding the former danger but by "sustained[11] and detailed administrative relationships" or, to put it in other words, by continued surveillance and policing.

Such policing will not be easy. In *Epperson* v. *Arkansas*, 393 U.S. 97 (1968) the Court held unconstitutional under the Establishment Clause a statute which forbade the teaching of evolution in public schools and in colleges and universities supported in whole or in part by public funds. Applied to the present case, this means that Federal officials must make sure not only that the biology instructor in a classroom financed with funds under the Act refrain from teaching creation according to Genesis but that he affirmatively teach creation according to Darwin.

Even if the term "sectarian instruction" is construed more narrowly to encompass only affirmative teaching, the task of the Federal inspector will be a formidable one. True enough unlike the classic inquisitor the censor will

[11] The surveillance must be sustained for 20 years. Section 404 of the statute (20 U.S.C. 754(b)) provides that if at any time within that period the facility is used for religious worship or sectarian instruction, restitution must be made to the Government.

be seeking to eradicate orthodoxy rather than heresy, but the Establishment Clause forbids the inhibition of religion no less than its advancement. In any event, it is just this type of state involvement in church affairs which both the Establishment and Free Exercise Clauses of the First Amendment forbid. *Cantwell* v. *Connecticut,* 310 U.S. 296 (1940); *Kedroff* v. *St. Nicholas Cathedral,* 344 U.S. 94 (1952); *Presbyterian Church* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church,* 393 U.S. 440 (1969).

It is no answer that the same "sustained and detailed administrative relationships" are required in respect to concededly nonreligious colleges receiving Federal funds lest evangelistic teachers bootleg sectarianism into their biology or astronomy lectures. The critical difference lies in the fact that the First Amendment does not forbid "sustained and detailed administrative relationships" between a secular government and a secular school system, but it does forbid them between a secular government and a religious school system.

Again we think it apposite to quote from Judge Coffin's opinion in *Dicenso* (and as to what follows, the court was unanimous):

> When the effect of the Salary Supplement Act is judged by this standard, two significant dangers appear. First, the Act authorizes a subsidy which, unlike the exemptions involved in *Walz,* must be annually renewed. In a nation of many sects, the efforts to obtain government financing of those few denominations which support school systems will inevitably excite bitter controversy. In some jurisdictions where the majority belong to a single denomination, state

subsidies of sectarian schools may amount to an establishment in the classic sense. In Rhode Island itself, sectarian controversy is likely to be exacerbated by the continuing financial crisis in its parochial schools, and by the open-ended nature of the Act. If this grant is constitutional, we would find it difficult to distinguish a 50 or 100 per cent subsidy of teachers' salaries, or a percentage subsidy of the total cost of "secular" education such as Rhode Island already provides its public schools.

On the other side of the coin, significant state subsidies will inevitably produce significant state limitations on the freedom of denominational schools. A direct subsidy of the educational process such as this statute provides requires greater administrative involvement between church and state than the payment of transportation costs involved in *Everson* or the loaning of textbooks in *Allen*. In *Everson*, the local school committee simply reimbursed the parents of parochial school children for bus fares. In *Allen* public school officials—in theory, at least—performed their customary task of determining which books were suitable for public school use. *Compare* R. I. Gen. Laws §16-1-9 (Supp. 1967). Under this statute, by contrast, the Commissioner of Education must monitor parochial school expenditures and in close cases determine which spending is "religious" and which "secular". This ongoing administrative relationship between government and the Catholic schools creates the possibility of legal disputes over the "secular-religious" distinction, *cf. Presbyterian Church in the United States* v. *Mary Elizabeth Blue Hill*

Memorial Presbyterian Church, 393 U.S. 440 (1969), and may well influence the allocation of church resources as the parishes tailor their spending to meet the Commissioner's criteria.

Equally important, the kind of involvement which this statute promotes may significantly limit the internal freedom of parochial schools. Already the Act has restricted the role of teachers. The evidence before us indicates that some otherwise qualified teachers have stopped teaching courses in religion in order to qualify for aid under the Act. One teacher, in fact, testified that he no longer prays with his class lest he endanger his subsidy. Similar restrictions may be expected on the content of courses. In this very case we have been forced to inquire into the teaching in Rhode Island's Catholic schools in order to determine whether religion "permeates" the teaching of secular subjects. *See also Board of Education* v. *Allen*, 392 U.S. at 248. Surely such inquiries represent a substantial limitation on the freedom of parochial schools to set their own curriculum. Moreover, as Judge Hastie pointed out dissenting in *Lemon* v. *Kurtzman*, 310 F. Supp. at 52, private conduct which is heavily subsidized by the state may be viewed as state action and subjected to the same standards of impartiality which we demand of the government. *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961); *cf. Evans* v. *Newton*, 382 U.S. 296 (1966).

Applying these standards to parochial schools might well restrict their ability to discriminate in admissions policies, *cf. Pennsylvania* v. *Board of Directors of City Trusts*, 353 U.S. 230 (1957), and in the hir-

ing and firing of teachers, *cf. Keefe* v. *Geanakos*, 418 F.2d 359 (1st Cir. 1969). At some point the school becomes "public" for more purposes than the Church could wish. At that point, the Church may justifiably feel that its victory on the Establishment Clause has meant abandonment of the Free Exercise Clause.

In short, we see as the necessary effects of the kind of legislation involved here not only substantial support for a religious enterprise, but also the kind of reciprocal embroilments of government and religion which the First Amendment was meant to avoid. We therefore hold that the Salary Supplement Act results in excessive government entanglement with religion and thus violates the Establishment Clause of the First Amendment. *Accord, Opinion of the Justices*, 261 A.2d 58 (Me. Jan. 15, 1970).

D. *Religion as a Means to a Secular End*

In his concurring opinion in *Schempp*, Mr. Justice Brenan said (374 U.S. at 265):

> • • • the teaching of both Torcaso and the Sunday Law Cases is that government may not employ religious means to serve secular interests, however legitimate they may be, at least without the clearest demonstration that nonreligious means will not suffice.

It was on this principle that he based his concurrence in *Walz*, and it is a principle which we believe is fully consistent with the history and purpose of the Establishment Clause.

One of the arguments stated by Madison in his *Memorial and Remonstrance* in opposition to taxation for

religious purposes, was that government's employment of "Religion as an engine of Civil policy . . . [is] an unhallowed perversion of the means of salvation." [12] The great statesman and jurist, Jeremiah S. Black, stated that the fathers of our Constitution "built up a wall of complete and perfect partition" between church and state in order that "one should never be used as an engine for the purpose of the other." [13]

To hold that government may as a matter of convenience rather than overriding necessity employ religion as a means to effect secular ends which are properly within governmental competence would go far toward making the First Amendment meaningless. Practically every defense of religious instruction in public schools is predicated on the not unreasonable assertion that religious education leads to morality and good citizenship. If religion could be used to achieve the obviously secular goals of morality and good citizenship, it would follow not only that religion could constitutionally be taught in the public schools, but also that tax-raised funds could be used to finance religion and religious education. (The preamble of the Virginia Assessment Bill which led to the *Remonstrance* stated that its purpose was "to correct the morals of men, restrain their vices, and preserve the peace of society.") Moreover, the government could reasonably find that some religions, such as Protestantism, Catholicism, and Judaism, are more likely to inculcate good citizenship than others (Jehovah's Witnesses or the Black Muslims for example) and, therefore, could aid the former and not the latter, a conclusion we doubt any court would accept today.

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[12] *Everson*, Appendix, 330 U.S. at 67.

[13] Black, J. S., *Essays and Speeches*, p. 53 (1885).

Measured by the standard that religion may not be used to serve secular interests in the absence of convincing proof of overriding necessity, the statute challenged here cannot be constitutionally applied to include sectarian colleges. Even assuming that the purpose of Congress was only to finance secular instruction for additional students, there is not the slightest evidence that this could not be accomplished (as it is and always has been in the states) by supporting public and private nonsectarian educational institutions. (Paragraph 26 of the complaint herein [A. 13] so alleges.)

E. *The Test of Time and Space*

In *Walz* both the Court's opinion by the Chief Justice (90 S. Ct. at 1415) and the concurring opinion of Mr. Justice Brennan (at 1418) stressed that tax exemption for churches went back to the earliest days of the Republic; both quoted the comment of Mr. Justice Holmes in *New York Trust Co.* v. *Eisner,* 256 U.S. 345, 349 (1921) that "a page of history is worth a volume of logic." Both stressed the fact that tax exemption for churches is a universal practice in effect in every one of the states. The antiquity and ubiquity of tax exemption is strong if not conclusive evidence of its constitutionality.

In the present case, however, history and practice point in exactly the opposite direction. From the disestablishment of churches at the end of the 18th and the beginning of the 19th centuries until the enactment of the statute challenged herein neither the Federal government nor any state has directly subsidized construction or operations of sectarian educational instructions. Just as the constitution or laws of every state in the Union authorize tax exemption

so do they universally forbid direct subsidization. See Note, *Catholic Schools and Public Money*, 50 Yale L.J. 917 (1941); *Horace Mann League* v. *Board of Public Works*, *supra*.

Other than the present case and the case of *Lemon* v. *Kautzman*, now before this Court, we know of no case in a court in the United States, Federal or state, in which a law providing for payment of taxraised funds to a church to subsidize its sectarian school operations or construction has been upheld as constitutional.[14] There have been a number of cases wherein parochial schools experiencing financial difficulties were purportedly transferred to the public school system under a plan whereby the parochial school premises were rented to the public school authorities and the teachers, usually nuns and sisters, were employed *en masse* by them as public school teachers. With but one exception,[15] the arrangement was held unconstitutional in every case[16] and even in the exceptional case constitutionality was based on a factual finding that the school was no longer a parochial school but had in fact become incorporated into the public school system even though the nuns turned over their public school salary checks to the religious order to which they belonged.

We conclude our consideration of the Establishment Clause with the suggestion that whether it forbids laws which provide for the subsidization of sectarian educational

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[14] The most recent decision holding such a law to be unconstitutional is *State ex rel. Chambers* v. *School District No. 10*, —— Mont. ——, decided July 28, 1970. See also, *Americans United* v. *Ind. School District No. 622*, —— Minn. ——, decided August 7, 1970 (*dictum*).

[15] *State ex rel. Johnson* v. *Boyd*, 217 Ind. 348 (1940).

[16] The cases cited and discussed in Note, *Catholic Schools and Public Money*, 50 Yale L.J. 917 (1941).

institutions, or laws whose purpose or effect is to advance religion, or which result in governmental entanglement with religion, or utilize religion to further a secular purpose in absence of convincing proof of overriding necessity or are contrary to the historic and universal interpretation of that Clause, the statute challenged here must be held an unconstitutional establishment of religion to the extent that it encompasses sectarian educational institutions as we have defined that term.

IV.

The Free Exercise of Religion.

The present suit is based not only on the Establishment but also on the Free Exercise Clause of the First Amendment. The complaint sets forth a separate and independent count asserting that the use of Federal funds to finance sectarian educational institutions constitutes compulsory taxation for religion and is therefore a violation of the plaintiffs' free exercise of religion. Fundamental to the concept of religious freedom, as envisaged by the Framers, was the belief that it was destructive of personal freedom to compel any man to pay taxes for the support of religion. Indeed, the history of the struggle for religious freedom in America is in large measure the history of the struggle against taxation for religious purposes.[17] It was the effort

[17] As the Court said in the *Everson* case, 330 U.S. at 11:

> These practices became so commonplace as to shock the freedom-loving colonilas into a feeling of abhorrence. The imposition of taxes to pay ministers' salaries and to build and maintain churches and church property aroused their indignation. It was these feelings which found expression in the First Amendment. • • •

to enact just such a statute for financing religious schools in Virginia that gave rise to that state's adoption of Jefferson's Bill for the Establishment of Religious Freedom which was the basis of both the Establishment and Free Exercise provisions of the First Amendment.

We believe that the logic of *Flast* v. *Cohen, supra,* requires a determination that use of tax-raised funds for religious purposes constitutes in historic and constitutional perspective a tax for religious purposes imposed upon every taxpayer. The fact that the taxes paid by the plaintiffs or other taxpayers are not specifically earmarked for the effectuation of the purposes of the statute in issue is as immaterial to a challenge under the Free Exercise Clause as under the Establishment Clause, for if there is a sufficient nexus to justify a claim under the one there must also be one under the other. Similarly, the fact that the amount of the taxpayer's payment allocated to the religious purpose is minute, is as immaterial in the one case as in the other. *Cf. Baker* v. *Carr,* 369 U.S. 186 (1962).

The crux of the matter is that when government uses tax-raised funds to support religion it is taxing citizens for a religious purpose, and is thus a violation of the Free Exercise Clause. That clause, no less than the Establishment Clause, is directly related in its origin to the struggle against the Virginia Assessment Bill, and that bill, as the present one, had as its purpose the subsidization of religious groups engaged in the propagation of their particular religions.

CONCLUSION

For the reasons set forth herein, the decision of the court below should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX

Excerpts from Public Law 88-204, 77 Stat. 363-70 and 374, as Amended (20 U.S.C. § 701 et seq.)

CHAPTER 21.—HIGHER EDUCATION FACILITIES [NEW]

§ 701. Congressional findings and declaration of policy

The Congress hereby finds that the security and welfare of the United States require that this and future generations of American youth be assured ample opportunity for the fullest development of their intellectual capacities, and that this opportunity will be jeopardized unless the Nation's colleges and universities are encouraged and assisted in their efforts to accommodate rapidly growing numbers of youth who aspire to a higher education. The Congress further finds and declares that these needs are so great and these steps so urgent that it is incumbent upon the Nation to take positive and immediate action to meet these needs through assistance to institutions of higher education, including graduate and undergraduate institutions, junior and community colleges, and technical institutes, in providing certain academic facilities.

SUBCHAPTER I.—GRANTS FOR CONSTRUCTION OF UNDERGRADUATE ACADEMIC FACILITIES

§ 711. Authorization of appropriations

(a) The Commissioner of Education (hereinafter in this chapter referred to as the "Commissioner") shall carry out during the fiscal year ending June 30, 1964, and each of the seven succeeding fiscal years, a program of grants to insti-

tutions of higher education for the construction of academic facilities in accordance with this subchapter.

(b) For the purpose of making grants under this subchapter, there is hereby authorized to be appropriated the sum of $230,000,000 for the fiscal year ending June 30, 1964, and for the succeeding fiscal year, $460,000,000 for the fiscal year ending June 30, 1966, $475,000,000 for the fiscal year ending June 30, 1967, $728,000,000 for the fiscal year ending June 30, 1968, and $936,000,000 for the fiscal year ending June 30, 1969; but for the fiscal year ending June 30, 1970, and the succeeding fiscal year, only such sums may be appropriated as Congress may hereafter authorize by law. In addition to the sums authorized to be appropriated for each fiscal year for which an appropriation is authorized by the preceding sentence, there is hereby authorized to be appropriated for that fiscal year for making such grants the difference (if any) between any specific sums authorized to be appropriated under the preceding sentence for the preceding fiscal year and the sums which were appropriated for such preceding year under such sentence.

(c) Sums appropriated pursuant to subsection (b) of this section shall remain available for reservation as provided in section 719 of this title until the close of the fiscal year next succeeding the fiscal year for which they were appropriated.

§ 712. Allotment of funds

The following percentage of the funds appropriated pursuant to section 711 of this title for a fiscal year shall be allotted among the States in the manner prescribed by section 713 of this title for use in providing academic facilities for public community colleges and public technical institutes:

(1) In the case of fiscal years ending before July 1, 1967, 22 per centum.

(2) In the case of the fiscal year ending June 30, 1968, 23 per centum.

(3) In the case of fiscal years ending after June 30, 1968, 24 per centum.

The remainder of the funds so appropriated for any fiscal year shall be allotted among the States in the manner as prescribed in section 714 of this title for use in providing academic facilities for institutions of higher education other than public community colleges and public technical institutes.

§ 713. Allotments for public community colleges and technical institutes—Basis of computation

(a) The funds to be allotted for any fiscal year for use in providing academic facilities for public community colleges and public technical institutes shall be allotted among the States on the basis of the income per person and the number of high school graduates of the respective States. Such allotments shall be made as follows: The Commissioner shall allot to each State for each fiscal year an amount which bears the same ratio to the funds being allotted as the product of—

(1) the number of high school graduates of the State, and

(2) the State's allotment ratio (as determined under subsection (d) of this section)

bears to the sum of the corresponding products for all the States.

Availability of funds

(b) (1) The amount of each allotment to a State under this section shall be available, in accordance with the provisions of this subchapter, for payment of the Federal share (as determined under sections 718(b) (3) and 751(d) of this title) of the development cost of approved projects for the construction of academic facilities within such State for public community colleges and public technical institutes. Sums allotted to a State for the fiscal year ending June 30, 1964, shall remain available for reservation as provided in section 719 of this title until the close of the next fiscal year, in addition to the sums allotted to such State for such next fiscal year.

(2) Notwithstanding any other provisions of this subchapter, any portion of a State's allotment under this section for a fiscal year for which applications from an institution qualified to receive grants under this section have not been received by the State Commission by January 1 of such fiscal year, shall, if the Commission so requests, be available, in accordance with the provisions of this subchapter, for payment of the Federal share (as determined under sections 718(b) (3) and 751(d) of this title) of the development cost of approved projects for the construction of academic facilities within such State for institutions of higher education other than public community colleges and public technical institutes.

Reallotment of unreserved funds at close of fiscal year; factors considered

(c) All amounts allotted under this section for any fiscal year which are not reserved as provided in section 719 of this title by the close of the fiscal year for which they are allotted, shall be reallotted by the Commissioner, on the

basis of such factors as he determines to be equitable and reasonable, among the States which, as determined by the Commissioner, are able to use without delay any amounts so reallotted for the purposes set forth in subsection (b) of this section. Amounts reallotted under this subsection shall be available for reservation until the close of the fiscal year next succeeding the fiscal year for which they were originally allotted.

Allotment ratio, specification and promulgation of; high school graduate defined

(d) For purposes of this section—

(1) The "allotment ratio" for any State shall be 1.00 less the product of (A) .50 and (B) the quotient obtained by dividing the income per person for the State by the income per person for all the States (not including Puerto Rico, the Virgin Islands, American Samoa, and Guam), except that (i) the allotment ratio shall in no case be less than .33⅓ or more than .66⅔, (ii) the allotment ratio for Puerto Rico, the Virgin Islands, American Samoa, and Guam shall be .66⅔, and (iii) the allotment ratio of any State shall be .50 for any fiscal year if the Commissioner finds that the cost of school construction in such State exceeds twice the median of such costs in all the States as determined by him on the basis of an index of the average per pupil cost of constructing minimum school facilities in the States as determined for such fiscal year under section 645(6) of this title, or, in the Commissioner's discretion, on the basis of such index and such other statistics and data as the Commissioner shall deem adequate and appropriate; and

(2) The allotment ratios shall be promulgated by the Commissioner as soon as possible after December 16, 1963, and annually thereafter, on the basis of the average of the incomes per person of the States and of all the States for the three most recent consecutive calendar years for which satisfactory data are available from the Department of Commerce.

(3) The term "high school graduate" means a person who has received formal recognition (by diploma, certificate, or similar means) from an approved school for successful completion of four years of education beyond the first eight years of schoolwork, or for demonstration of equivalent achievement. For the purposes of this section the number of high school graduates shall be limited to the number who graduated in the most recent school year for which satisfactory data are available from the Department of Health, Education and Welfare. The interpretation of the definition of "high school graduate" shall fall within the authority of the Commissioner.

§ 714. Allotments for institutions of higher education other than public community colleges and technical institutes—Considerations and determinations affecting

(a) Of the funds to be allotted for any fiscal year for use in providing academic facilities for institutions of higher education other than public community colleges and public technical institutes (1) one-half shall be allotted by the Commissioner among the States so that the allotment to each State under this clause will be an amount which bears the same ratio to such one-half as the number of students enrolled in institutions of higher education in such State bears to the total number of students enrolled in such insti-

tutions in all the States; and (2) the remaining one-half shall be allotted by him among the States so that the allotment to each State under this clause will be an amount which bears the same ratio to such remainder as the number of students enrolled in grades nine to twelve (both inclusive) of schools in such State bears to the total number of students in such grades in schools in all the States. For the purposes of this subsection, (A) the number of students enrolled in institutions of higher education shall be deemed to be equal to the sum of (i) the number of full-time students and (ii) the full-time equivalent of the number of part-time students as determined by the Commissioner in accordance with regulations; and (B) determinations as to enrollment under either clause (1) or clause (2) of this subsection shall be made by the Commissioner on the basis of data for the most recent year for which satisfactory data with respect to such enrollment are available to him.

Availability of funds

(b) (1) The amount of each allotment to a State under this section shall be available, in accordance with the provisions of this subchapter, for payment of the Federal share (as determined under sections 718(b) (3) and 751(d) of this title) of the development cost of approved projects for the construction of academic facilities within such State for institutions of higher education other than public community colleges and public technical institutes. Sums allotted to a State for the fiscal year ending June 30, 1964, shall remain available for reservation as provided in section 719 of this title until the close of the next fiscal year, in addition to the sums allotted to such State for such next fiscal year.

(2) Notwithstanding any other provisions of this subchapter, any portion of a State's allotment under this section for a fiscal year for which applications from an institution qualified to receive grants under this section have not been received by the State Commission by January 1 of such fiscal year, shall, if the Commission so requests, be available, in accordance with the provisions of this subchapter, for payment of the Federal share (as determined under sections 718(b) (3) and 751(d) of this title) of the development cost of approved projects for the construction of academic facilities within such State for public community colleges and public technical institutes.

Reallotment of unreserved funds at close of fiscal year; factors considered

(c) All amounts allotted under this section for any fiscal year which are not reserved as provided in section 719 of this title by the close of the fiscal year for which they are allotted, shall be reallotted by the Commissioner on the basis of such factors as he determines to be equitable and reasonable, among the States which, as determined by the Commissioner, are able to use without delay any amounts so reallotted for the purposes set forth in subsection (b) of this section. Amounts reallotted under this subsection shall be available for reservation until the close of the fiscal year next succeeding the fiscal year for which they were originally allotted.

§ 715. State commissions and plans; authorized expenditures

(a) Any State desiring to participate in the grant program under this subchapter shall designate for that purpose an existing State agency which is broadly representative of the public and of institutions of higher education

(including junior colleges and technical institutes) in the State, or, if no such State agency exists, shall establish such a State agency, and submit to the Commissioner through the agency so designated or established (in this subchapter referred to as the "State commission"), a State plan for such participation. The Commissioner shall approve any such plan which—

(1) provides that it shall be administered by the State commission;

(2) sets forth, consistently with basic criteria prescribed by regulation pursuant to section 717 of this title, objective standards and methods (A) for determining the relative priorities of eligible projects for the construction of academic facilities submitted by institutions of higher education within the State, and (B) for determining the Federal share of the development cost of each such project (unless such plan provides for a uniform Federal share for all such projects);

(3) provides that the funds allotted (or reallotted) for any year under section 713 of this title will be available (except as provided in section 713(b) (2) of this title) only for use for the construction of academic facilities for public community colleges and public technical institutes, and that funds allotted (or reallotted) for any year to the State under section 714 of this title will be available (except as provided in section 714(b) (2) of this title) only for use for the construction of academic facilities for institutions of higher education other than public community colleges and public technical institutes;

(4) provides (A) for assigning priorities solely on the basis of such criteria, standards, and methods to

eligible projects submitted to the State commission and deemed by it to be otherwise approvable under the provisions of this subchapter; and (B) for approving and recommending to the Commissioner, in the order of such priority, applications covering such eligible projects, and for certifying to the Commissioner the Federal share, determined by the State commission under the State plan, of the development cost of the project involved;

(5) provides for affording to every applicant, which has submitted to the State commission a project, an opportunity for a fair hearing before the State commission as to the priority assigned to such project or as to any other determination of the State commission adversely affecting such applicant; and

(6) provides (A) for such fiscal control and fund accounting procedures as may be necessary to assure proper disbursement of and accounting for Federal funds paid to the State commission under this subchapter, and (B) for the making of such reports, in such form and containing such information, as may be reasonably necessary to enable the Commissioner to perform his functions under this subchapter.

(b) The Commissioner is authorized to expend not exceeding $3,000,000 during the fiscal years ending June 30, 1965, and June 30, 1966, and not exceeding $7,000,000 for the fiscal year ending June 30, 1967, and each of the two succeeding fiscal years, in such amounts as he may consider necessary (1) for the proper and efficient administration of the State plans approved under this subchapter, and sections 1121–1129 of this title, including expenses

which he determines were necessary for the preparation of such plans, and (2) for grants, upon such terms and conditions as the Commissioner determines will best further the purposes of this chapter, to State commissions for conducting, either directly or through other appropriate agencies and institutions, comprehensive planning to determine the construction needs of institutions (and particularly combinations and regional groupings of institutions) of higher education. Not more than $3,000,000 may be expended in any fiscal year for the purposes set forth in clause (1). For the fiscal year ending June 30, 1970, and the succeeding fiscal year, the Commissioner may expend for purposes of this subsection only such sums as Congress may hereafter authorize by law.

§ 716. Eligibility of institutions for grants

An institution of higher education shall be eligible for a grant for construction of an academic facility under this subchapter only if such construction will, either alone or together with other construction to be undertaken within a reasonable time, (1) result in an urgently needed substantial expansion of the institution's student enrollment capacity or capacity to carry out extension and continuing education programs on the campus of such institution, or (2) in the case of a new institution of higher education, result in creating urgently needed enrollment capacity or capacity to carry out extension and continuing education programs on the campus of such institution.

§ 717. Basic criteria for determining priorities and Federal share

(a) As soon as practicable after December 16, 1963 the Commissioner shall by regulation prescribe basic criteria

to which the provisions of State plans setting forth standards and methods for determining relative priorities of eligible construction projects, and the application of such standards and methods to such projects under such plans, shall be subject. Such basic criteria (1) shall be such as will best tend to achieve the objectives of this subchapter while leaving opportunity and flexibility for the development of State plan standards and methods that will best accommodate the varied needs of institutions in the several States, and (2) shall give special consideration to expansion of undergraduate enrollment capacity. Subject to the foregoing requirements, such regulations may establish additional and appropriate basic criteria, including provision for considering the degree to which applicant institutions are effectively utilizing existing facilities, provision for allowing State plans to group or provide for grouping, in a reasonable manner, facilities or institutions according to functional or educational type for priority purposes, and, in view of the national objectives of this chapter, provision for considering the degree to which the institution serves students from two or more States or from outside the United States; and in no event shall an institution's readiness to admit such out-of-State students be considered as a priority factor adverse to such institution.

(b) The Commissioner shall further prescribe by regulation the basic criteria for determining the Federal share of the development cost of any eligible project under this subchapter within a State, to which criteria the applicable standards and methods set forth in the State plan for such State shall conform in the absence of a uniform statewide Federal share specified in or pursuant to such plan. In the case of a project for an institution of higher education other than a public community college or public technical

institute, the Federal share shall in no event exceed 33⅓ per centum of its development cost; and in the case of a project for a public community college or public technical institute, the Federal share shall in no event exceed 40 per centum of its development cost.

(c) Section 1003 of Title 5 shall apply to the prescription of regulations under this section, notwithstanding the provisions of clause (2) thereof.

§ 718. Applications for grants—Submission of applications by institutions

(a) Institutions of higher education which desire to obtain grants under this subchapter shall submit applications therefor at such time or times and in such manner as may be prescribed by the Commissioner, and such applications shall contain such information as may be required by or pursuant to regulation for the purpose of enabling the Commissioner to make the determinations required to be made by him under this subchapter.

Conditions for approval

(b) The Commissioner shall approve an application covering a project for construction of an academic facility and meeting the requirements prescribed pursuant to subsection (a) of this section if—

(1) the project is an eligible project as determined under section 716 of this title;

(2) the project has been approved and recommended by the appropriate State commission;

(3) the State commission has certified to the Commissioner, in accordance with the State plan, the Fed-

eral share of the development cost of the project, and sufficient funds to pay such Federal share are available from the applicable allotment of the State (including any applicable reallotment to the State);

(4) the project has, pursuant to the State plan, been assigned a priority that is higher than that of all other projects within such State (chargeable to the same allotment) which meet all the requirements of this section (other than this clause) and for which Federal funds have not yet been reserved;

(5) the Commissioner determines that the construction will be undertaken in an economical manner and will not be of elaborate or extravagant design or materials; and

(6) the Commissioner determines that (in addition to the assurance required by section 753 of this title and such assurance as to title to the site as he may deem necessary) the application contains or is supported by satisfactory assurances—

(A) that Federal funds received by the applicant will be used solely for defraying the development cost of the project covered by such application,

(B) that sufficient funds will be available to meet the non-Federal portion of such cost and to provide for the effective use of the academic facility upon completion, and

(C) that the facility will be used as an academic facility during at least the period of the Federal interest therein (as defined in section 754 of this title).

Amendments of applications

(c) Amendments of applications shall, except as the Commissioner may otherwise provide by or pursuant to regulation, be subject to approval in the same manner as original applications.

§ 719. Reservation and payment of grant

Upon his approval of any application for a grant under this subchapter, the Commissioner shall reserve from the applicable allotment (including any applicable reallotment) available therefor, the amount of such grant, which (subject to the limits of such allotment or reallotment) shall be equal to the Federal share (ascertained by him under section 718(b) (3) of this title) of the development cost of the project covered by such application. The Commissioner shall pay such reserved amount, in advance or by way of reimbursement, and in such installments consistent with construction progress, as he may determine. The Commissioner's reservation of any amount under this section may be amended by him, either upon approval of an amendment of the application covering such project or upon revision of the estimated development cost of a project with respect to which such reservation was made, and in the event of an upward revision of such estimated cost approved by him he may reserve the Federal share of the added cost only from the applicable allotment (or reallotment) available at the time of such approval.

§ 720. Disapproval of State plans; notice and hearing; findings of Commissioner; notification of non-eligibility

(a) The Commissioner shall not finally disapprove any State plan submitted under this subchapter, or any modifi-

cation thereof, without first affording the State commission submitting the plan reasonable notice and opportunity for a hearing.

(b) Whenever the Commissioner, after reasonable notice and opportunity for hearing to the State commission administering a State plan approved under this subchapter, finds—

(1) that the State plan has been so changed that it no longer complies with the provisions of section 715(a) of this title, or

(2) that in the administration of the plan there is a failure to comply substantially with any such provision,

the Commissioner shall notify such State commission that the State will not be regarded as eligible to participate in the program under this subchapter until he is satisfied that there is no longer any such failure to comply.

§ 721. Judicial review—Appeal by State of Commissioner's final action to court of appeals

(a) If any State is dissatisfied with the Commissioner's final action with respect to the approval of its State plan submitted under section 715(a) of this title or with his final action under section 720(b) of this title, such State may appeal to the United States court of appeals for the circuit in which such State is located. The summons and notice of appeal may be served at any place in the United States. The Commissioner shall forthwith certify and file in the court the transcript of the proceedings and the record on which he based his action.

Findings of Commissioner conclusive if substantially supported; remand for taking further evidence; new or modified findings conclusive if supported

(b) The findings of fact by the Commissioner, if supported by substantial evidence, shall be conclusive; but the court, for good cause shown, may remand the case to the Commissioner to take further evidence, and the Commissioner may thereupon make new or modified findings of fact and may modify his previous action, and shall certify to the court the transcript and record of the further proceedings. Such new or modified findings of fact shall likewise be conclusive if supported by substantial evidence.

Jurisdiction of court of appeals; review by Supreme Court

(c) The court shall have jurisdiction to affirm the action of the Commissioner or to set it aside, in whole or in part. The judgment of the court shall be subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of Title 28.

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SUBCHAPTER IV.—GENERAL PROVISIONS

§ 751. Definitions

As used in this chapter—

(a) (1) Except as provided in subparagraph (2) of this paragraph, the term "academic facilities" means structures suitable for use as classrooms, laboratories, libraries, and related facilities necessary or appropriate for instruction of students, or for research, or for administration[1] of the

educational or research programs, of an institution of higher education, and maintenance, storage, or utility facilities essential to operation of the foregoing facilities. Plans for such facilities shall be in compliance with such standards as the Secretary of Health, Education, and Welfare may prescribe or approve in order to insure that facilities constructed with the use of Federal funds under this chapter shall be, to the extent appropriate in view of the uses to be made of the facilities, accessible to and usable by handicapped persons.

(2) The term "academic facilities" shall not include (A) any facility intended primarily for events for which admission is to be charged to the general public, or (B) any gymnasium or other facility specially designed for athletic or recreational activities, other than for an academic course in physical education or where the Commissioner finds that the physical integration of such facilities with other academic facilities included under this chapter is required to carry out the objectives of this chapter, or (C) any facility used or to be used for sectarian instruction or as a place for religious worship, or (D) any facility which (although not a facility described in the preceding clause) is used or to be used primarily in connection with any part of the program of a school or department of divinity, or (E) any facility used or to be used by a school of medicine, school of dentistry, school of osteopathy, school of pharmacy, school of optometry, school of podiatry, or school of public health, as these terms are defined in section 293d of Title 42, or a school of nursing as defined in section 298b of Title 42. For the purposes of this subparagraph, the term "school or department of divinity" means an institu-

tion, or a department or branch of an institution, whose program is specifically for the education of students to prepare them to become ministers of religion or to enter upon some other religious vocation or to prepare them to teach theological subjects.

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